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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SANFORD S. WADLER, an individual,

Plaintiff,

v.

BIO RAD LABORATORIES, INC., a Delaware corporation; Norman Schwartz; Louis Drapeau; Alice N. Schwartz; Albert J. Hillman; Deborah J. Neff,

Defendants.

Case No. 3:15-CV-2356 JCS

DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFF'S OBJECTION TO AND MOTION TO EXCLUDE JOHN CASSINGHAM AND CHRISTOPHER KAUFMAN

Trial Date: January 17, 2016
Time: 8:00 a.m.
Place: Courtroom D, 15th Floor
Judge: The Honorable Joseph C. Spero

The complete record regarding witness disclosures in this case establishes that John Cassingham should be permitted to testify as an impeachment witness. Mr. Cassingham's testimony is critical to address what the defense believes is a deliberate fraud on the Court. Defendants respectfully submit that this evidence should be heard by the jury.

Mr. Wadler's status as an impeachment witness should be considered with reference to the context of the Rule 26 disclosures in the case. On May 18, 2016, Defendants amended their Rule 26 disclosures to include additional witnesses, including Mr. Cassingham. (Defs' Supp'l Rule 26 Disclosure at 4.) Two days later the parties submitted a CMC statement referencing that Rule 26 disclosure and the dispute over the number of depositions for the witnesses identified in that disclosure:

> [T]he parties still do not agree about the number of depositions necessary over the default limit of 10 per side. Defendants have now identified 18 witnesses with evidence supposedly supporting their claims, plus an undisclosed number of outside counsel at two firms. Plaintiff should have the right to depose any witness that may be called at trial to testify against him.

[Dkt. 73 at 7.]

It was this issue, emanating from Defendants' Rule 26 disclosures, that led to the parties' stipulation and this Court's order:

> Plaintiff will take ten depositions by August 1, 2016. On September 14, 2016, the parties shall disclose to each other any witnesses they ***intend to call at trial*** that have not already been deposed. If there are any witnesses that either party will call at trial that have not previously been deposed, the other party will have the opportunity to depose such witnesses between October 3, 2016 and October 31, 2016, or such later date as the witnesses can reasonably be scheduled for deposition.

[Dkt. 77 at 2 (emphasis added).]

Pursuant to the Order, Mr. Cassingham was briefly identified on September 14 on the list of additional witnesses Bio-Rad intended to call at trial. This designation is separate and distinct from impeachment witnesses. Fed. R. Civ. P. 26 (a)(1)(A). Karin Kramer's email of October 19, 2016 removed Mr. Cassingham from the case-in-chief "witness list"—the clear construction of the Rule 26 list as there is no list of impeachment witnesses required by the rule.

Mr. Wadler has no legitimate claim to prevent the jury from receiving highly probative evidence on this critical issue. Plaintiff has always known about Mr. Cassingham, by his own telling considers Mr. Cassingham a "central witness," [Dkt. 182 at 3], and easily could have deposed Mr. Cassingham and called him as a witness at trial. It is simply a fallacy to argue that Plaintiff was prevented from deposing Mr. Cassingham merely because Defendants removed him from their witness list just days after adding him. Mr. Cassingham was Mr. Wadler's chief lieutenant at Bio-Rad and Mr. Wadler was well aware of what, if anything, Mr. Cassingham could add to Mr. Wadler's case. Had Mr. Wadler not offered his testimony at trial, which Defendants contend is utterly false, Defendants would not be calling Mr. Cassingham for a ten-minute appearance now. Defendants' request to do so is fully in keeping with the purpose behind impeachment witnesses, the stipulation the parties entered into, and the search for the truth in this case. In fact, this is precisely the situation in which impeachment witnesses should be called.

There is no unfairness to Plaintiff from calling Mr. Cassingham for impeachment. But, it would severely distort the fact-finding process to deny Defendants the opportunity to present highly probative impeachment on a critical issue in the case. Without it, we respectfully submit that false testimony will be received and considered by the jury, potentially affecting the very outcome of the trial.

DATED: January 30, 2017

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By *_/s/ John M. Potter_*
John M. Potter

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